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**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Damon Corporation

**File:** B-232721

**Date:** February 3, 1989

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### **DIGEST**

1. Award to a firm that employs a former government employee is not precluded on the basis of a conflict of interest where there is no evidence to demonstrate that the employee exerted improper influence on behalf of the awardee.
2. Protest is sustained where, because technical evaluation of the protester's proposal was in some instances unreasonable, and in performing a technical/price trade-off the contracting officer relied on unsupported conclusions of a technical approval authority, it is unclear that the contracting officer would have chosen to award the contract to a firm that offered to perform at a price substantially higher than that offered by the protester.

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### **DECISION**

Damon Corporation protests the award of a contract to Blood Systems, Inc. (BSI), under request for proposals (RFP) No. F41689-88-R-A178, issued by the Department of the Air Force for Human Immune Deficiency Virus (HIV or AIDS) testing services. Damon asserts that the Air Force evaluation of its proposal was unreasonable, that the contract was improperly awarded to BSI at a cost substantially higher than that proposed by Damon and that the Air Force failed to hold meaningful discussions with Damon. Damon also protests that the contract award to BSI is precluded by a conflict of interest because BSI hired a former Air Force employee with ties to the AIDS testing program.

While we see no basis to conclude that the award to BSI is precluded by a conflict of interest, we sustain the protest based on our finding that the Air Force improperly evaluated Damon's proposal.

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The RFP was issued on June 2, 1988, with a closing date for the receipt of proposals of July 6. Offerors were to propose unit and total prices for various testing services based on estimates set out in the RFP for 1 base year and 3 option years. For example, for the primary task--initial testing of specimens--the RFP estimated that the contractor would be required to perform 488,100 tests in the base year, for which unit and total prices were to be proposed. Of that number, the RFP estimated that 4,393 second tests and 1,464 third tests would be required to confirm initial positive results, according to the procedures set out in the statement of work.

The RFP provided for the evaluation of technical factors and price with price subordinate to the cumulative technical factors in the award decision. The RFP listed the technical factors as: (1) special technical factors, (2) soundness of approach, (3) understanding the problem, and (4) compliance with requirements. Section M of the RFP further defined the standards against which offerors would be evaluated under each factor. Although not disclosed in the RFP, the evaluation was based on 600 total points; technical factors were weighted 70 percent or 420 points, and price was weighted 30 percent or 180 points. The award was to be made on the basis of the combination of technical excellence and total price considered most advantageous to the government. The RFP noted that the proposals would first be evaluated by a technical evaluation team whose findings would be reviewed by a Technical Approving Authority (TAA). The findings would then be reviewed by the Procurement Approving Authority who was responsible for the final selection decision and, in this case, was the contracting officer.

The Air Force received six timely proposals, evaluated them and placed three, including the proposals submitted by BSI and Damon, in the competitive range. On July 12, the Air Force sent each offeror in the competitive range a list of questions which noted deficiencies or indicated the need for clarifications and requested best and final offers (BAFOs) by August 4. The technical evaluation team reviewed the BAFOs and gave BSI 412 technical points. BSI's proposed price of \$6,962,331 received 157.57 points, for a total of 569.57 points. Damon received 544 total points, 364 for its technical proposal and 180 for its proposed price of \$6,161,968. The TAA reviewed the results and forwarded them to the contracting officer for a selection decision.

In reviewing the evaluation results to determine which offer was most advantageous to the government, the contracting officer first looked at the percentage of available technical and total points received by each offeror. BSI

received 98 percent of the available technical points and 94.7 percent of the available total points, while Damon received 85 percent of the available technical points and 89.7 percent of the available total points. He then computed and compared the proposed price per technical point, which was \$16,899 for BSI and \$16,928 for Damon. Finally, because of the large dollar difference between the two offers, the contracting officer requested the TAA to provide a more detailed explanation of the deficiencies in Damon's proposal. The TAA responded on August 16 with an analysis concluding that the award to BSI was worth the additional cost. Subsequently, based on this information the contracting officer determined that Damon's proposal had enough overall deficiencies to cause doubt that the firm could perform up to Air Force standards. Accordingly, the contracting officer determined that the proposal submitted by BSI was most advantageous to the government and on September 12 awarded the contract to BSI. Damon filed its protest with our Office on September 23.

#### CONFLICT OF INTEREST

Damon first argues that BSI should be precluded from receiving the contract award because a former Air Force employee involved in the AIDS testing program went to work for BSI, creating a conflict of interest.

When a conflict of interest is alleged, our role within the context of a bid protest is to determine whether any action of the former government employee resulted in prejudice for or on behalf of the awardee. The mere fact that a former government employee is subsequently employed by a company awarded a contract by the employee's former agency is an insufficient basis to challenge the award where there is no evidence that the former employee influenced the award. Louisiana Foundation for Medical Care, B-225576, Apr. 29, 1987, 87-1 CPD ¶ 451. Further, there must be hard facts and not mere suspicion or innuendo that a conflict of interest exists before a firm may be excluded from a competition on this basis. Imperial Schrade Corp., 66 Comp. Gen. 307 (1987), 87-1 CPD ¶ 254.

Here, the record shows that the initial AIDS testing contract was awarded to BSI on a competitive basis in 1986. The employee in question helped write the statement of work (SOW) for that procurement and was a member of the technical panel that reviewed proposals submitted in response to the procurement. During the performance of the contract, the employee was the project manager. The employee also wrote the SOW for the current solicitation; however, this SOW, with minor exceptions, is the same as the prior SOW. The

employee has had no involvement with this procurement since March 1988, when he notified his supervisors that he would be interviewing with BSI on April 6. The employee retired from the Air Force on July 1 and began work for BSI on July 18. Proposals under the RFP were received on July 6. BSI has reported to the Air Force that the employee is not involved with any government contracts.

These facts do not demonstrate that any action of the former government employee resulted in prejudice for or on behalf of BSI; that the employee was accorded access to inside agency information concerning the procurement; or that the employee's prior employment improperly influenced the evaluation and award. Consequently, this basis of Damon's protest does not provide a basis on which to question the award to BSI. See Walker's Freight Line, B-220216.2, Jan. 15, 1986, 86-1 CPD ¶ 45.

#### DISCUSSIONS

Damon contends that the Air Force improperly failed to advise it of four alleged deficiencies in its proposal noted by the technical evaluation team and the TAA in his supplemental report to the contracting officer. As discussed further below, we need not address this issue with regard to two of the alleged deficiencies identified by the TAA--Damon's experience with a confirmatory testing technique called for by the RFP and the effect on epidemiological data collection of Damon's plan for sequential retesting of positive specimens--since we find that the TAA's criticism of Damon's proposal in these areas was unwarranted. With regard to the other two deficiencies--Damon's capability of handling potential surges in workload and Damon's plan for reporting "optical density"--we find that Damon was not prejudiced by the Air Force's failure to raise the issues during discussions.

#### Workload Surge Capacity

The RFP estimated that the successful contractor would be required to perform approximately 1,500 tests per day. The RFP additionally provided, however, that the estimate could vary by as much as 15 percent, and also required the contractor to have the capability to increase the number of specimens processed monthly by as much as two-fold. In evaluating Damon's proposal, the Air Force questioned whether Damon would be able to meet the workload surge

requirements with its proposed staff in light of the fact that Damon also currently was performing eight other government contracts. As the Air Force concedes, the evaluation team's concern about Damon's proposal in this area was not raised during discussions.

While Damon disagrees with the Air Force's assessment of the risk that Damon would not be able to meet potential workload surges, Damon does not argue that it would have revised its proposal had it been advised of the Air Force's concern during discussions. Rather, Damon contends that its current staffing is sufficient to meet the surge requirements, but does not explain in any detail how it would have persuaded the Air Force that its current staffing is adequate. Under these circumstances, we fail to see how Damon was prejudiced by the Air Force's failure to raise the surge capacity issue during discussions.

#### Reporting Optical Density

In his supplemental evaluation report to the contracting officer, the TAA stated that he was concerned about Damon's proposal to report the optical density results for each specimen on the transmittal form to be submitted to the field activity, when the RFP required that the transmittal form only indicate whether the test results were positive or negative. The TAA found Damon's proposal unacceptable because, in the past, sending optical density results to the field has resulted in stigmatizing the personnel affected. Damon disputes this finding, arguing that it intended to provide the optical density results only to Air Force headquarters, not the field.

In our view, the TAA's conclusion was reasonable since the only transmittal form referred to in the RFP is the one sent to the field, not, as Damon asserts, to Air Force headquarters. In any event, even assuming that Damon would have revised its proposal in this regard had the issue been raised in discussions, the effect on the selection decision of the TAA's conclusion that Damon's proposal was defective in this area was minimal, since the issue was not relied on by the technical evaluation panel in scoring the proposal and was discussed only briefly in the TAA's report. As a result, we do not believe that Damon was prejudiced by the Air Force's failure to raise the issue with Damon.

#### TECHNICAL EVALUATION

Damon challenges both the technical evaluation team's analysis of its BAFO and the later supplemental review by the TAA on which the contracting officer relied in making

the selection decision. As explained in detail below, we find that several of the deficiencies noted by the evaluation team and the TAA are not supported by the record. As a result, given that the selection decision was based on a technical/price trade-off between BSI's higher rated, higher priced proposal and Damon's lower rated, lower priced proposal, it is unclear whether the contracting officer would have reached the same conclusion--that BSI's proposal was most advantageous to the government--had the evaluation results on which he relied not included the erroneous findings regarding Damon's proposal.

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties arising from a defective evaluation. Accordingly, our Office will not make an independent determination of the merits of technical proposals; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Varian Associates, Inc., B-228545, Feb. 18, 1988, 88-1 CPD ¶ 153.

In this case, Damon challenges each of the deficiencies in its proposal identified by the technical evaluation team and the TAA in his supplemental analysis to the contracting officer. Except for the specific findings discussed further below, we see no basis to object to the Air Force's conclusions in the other areas of Damon's proposal. For example, Damon contends that the Air Force improperly downgraded its offer because Damon proposed to use two laboratories for testing, one in Texas for the initial testing and a second in California for confirmatory testing. The Air Force found that this approach would make it more difficult and costly to oversee performance of the contract. While Damon disagrees with the Air Force's position, arguing in part that it has successfully used this approach on prior contracts, we believe it was reasonable for the Air Force to conclude that use of two laboratories involves additional administrative efforts and concerns that are not involved when only one laboratory is used.

In our view, however, the record does not support the Air Force's findings regarding Damon's compliance with the RFP requirement for return of specimens to the Air Force; Damon's experience in one technique for confirmatory testing called for by the RFP; and Damon's proposal for retesting positive specimens.

## Return of Specimens

The statement of work in the RFP requires that all specimens testing positive based on initial screenings undergo confirmatory testing using a technique called Western Blot testing. The confirmatory testing is performed using a sample extracted from the specimen. The RFP provides that the remaining portion of the specimen is to be returned to the Air Force.

In evaluating Damon's initial proposal, the evaluation team found that Damon had not adequately addressed this requirement. As a result, Damon was asked during discussions to provide details on the procedures for forwarding positive samples to the Air Force and to specify the final disposition of samples sent to its California laboratory for confirmatory testing. In its BAFO, Damon responded that it intended to return to the Air Force the remainder of the specimen from which the sample had been taken for confirmatory testing, but that it would incinerate any remaining portion of the sample itself. (According to Damon, the remainder is a minuscule amount.) However, Damon further stated that if the Air Force did not want the remaining portions of the samples incinerated, they would be returned to the Air Force.

Despite the explanation in Damon's BAFO, the evaluation team remained convinced that Damon had failed to meet the RFP requirement. In his subsequent report to the contracting officer on the deficiencies in Damon's proposal, the TAA reiterated the team's concern about Damon's proposal in this area.

In light of Damon's explicit agreement to return the remaining portions to the Air Force, we fail to see how the Air Force could reasonably conclude that Damon had refused to comply with the RFP requirement in this area.

## Confirmatory Testing Experience

One of the types of confirmatory testing called for by the RFP is called the IFA technique. In his analysis, the TAA stated that Damon did not demonstrate a significant level of experience with the IFA technique. This conclusion, however, is directly contradicted by both the initial and BAFO evaluation reports. Thus, the report on the initial evaluation states that Damon's proposal "documents full experience in conducting HIV screening and confirmatory assays which include the spectrum of ELISA, Western Blot, RDNA and IFA tests prescribed by the RFP." The BAFO evaluation report states that Damon "possesses relevant

experience and documented proficiency in the full spectrum of screening and confirmatory HIV tests." In addition, the record shows that the TAA himself reviewed the evaluation reports before they were submitted to the contracting officer, and stated that he fully agreed with their findings.

Given this inconsistency between the technical evaluation reports and the TAA's finding, and in view of the fact that the TAA provided no explanation or support for his conclusion that Damon lacked the relevant experience, we believe that the TAA's finding was unreasonable.

#### Retesting Positive Specimens

Section 5.2 of the statement of work, which contained the specimen testing requirements, provided for the contractor to perform an initial screening test on each specimen. If the specimen tested positive, it was to be retested once. If the retest was negative, the specimen was to be tested a third time. Offerors were required to propose separate unit prices for each of the three tests based on estimates of the number of tests required set out in the RFP. For example, for the base year, the RFP estimated requirements for 488,100 initial tests, 4,393 second tests, and 1,464 third tests.

In its initial proposal, Damon explained that whenever a specimen tests positive during the first screening, Damon's practice is immediately to retest the specimen in duplicate rather than sequentially as provided in the RFP. With regard to pricing the three tests, Damon provided unit prices for the first and second tests, but entered "\$0" for the third test. The evaluation team concluded that Damon failed to comply with the RFP and during discussions requested that Damon provide details on the procedures to determine the need for the third test and to monitor the prices for the third test when the second and third tests were performed concurrently.

In response, Damon reiterated that it retests each sample that initially tests positive in duplicate in order to save time and labor costs. Damon further explained that although it always assumes the need for a third test when the first test is positive, it included in its proposed price for the second tests only the smaller number of third tests the RFP itself estimated would need to be performed. Damon further



stated that if the Air Force required it, Damon would perform the tests sequentially. Damon pointed out that its pricing structure would not change because it already incorporated the cost of the number of third tests estimated in the RFP.

After reviewing Damon's BAFO, the evaluation team continued to find that Damon had not agreed to comply with the requirement to perform the tests sequentially rather than concurrently. The team stated that it was concerned that Damon's plan for concurrent testing would cause the Air Force to pay for third tests that were either unnecessary or would not be performed.

We find that the Air Force improperly downgraded Damon's proposal in this area. First, Damon in fact agreed to perform the tests sequentially. Further, there was no basis for the evaluation team to conclude that the Air Force would be charged for unnecessary third tests. As explained in its BAFO, Damon included in its price for the second tests only the cost of the number of third tests estimated by the Air Force; thus the Air Force is being charged the same amount that it would have been charged if Damon had separately priced the second and third tests.

In his supplemental analysis of Damon's proposal, the TAA also expressed concern about Damon's proposal in this area, stating that by retesting positive samples in duplicate, Damon would deprive the Air Force of data for epidemiological study of samples which tested positive-negative-positive. We fail to see, however, why the needed data would not be available since there would be test results from three tests whether Damon performed them sequentially or concurrently. We therefore do not believe that the TAA had a sufficient basis for his criticism of Damon's proposal in this area.

#### TECHNICAL/PRICE TRADE-OFF

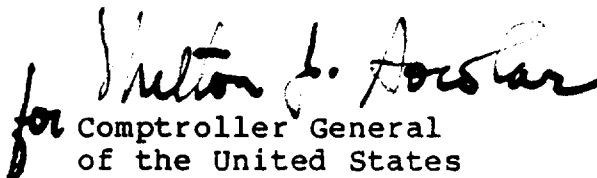
In view of our conclusion that the evaluation of Damon's proposal was flawed with regard to the three areas discussed above, the issue is what impact these erroneous findings had on the technical/price trade-off on which the contracting officer based the award decision. In order to determine the effect on Damon's scoring, in each instance where we found that Damon's proposal was unreasonably evaluated we located the evaluation factors and subfactors where the individual evaluators had deducted points, and increased Damon's points to the maximum permitted for that factor or subfactor. We then recomputed Damon's score in accordance with the RFP. Our calculation increases Damon's technical score from 364

to 377 points, and its total score from 544 to 557 points. Although BSI's proposal is still higher scored (412 technical points, 569 total points), we cannot conclude that given the closer technical scores, the contracting officer nevertheless would have selected BSI despite the large difference in price between the two proposals (approximately \$800,000).

The record shows that in deciding that BSI's technical proposal was worth the additional cost, the contracting officer first compared the percentage of the 420 available technical points that each offeror received (98 percent for BSI and 85 percent for Damon); the percentage of the 600 total technical and price points each received (94.7 percent for BSI and 89.7 percent for Damon); and the price per technical point for each (\$16,899 for BSI and \$16,928 for Damon). Based on our recalculation of Damon's score discounting the areas in which it was downgraded unreasonably, Damon's share of the available technical points would increase from 85 percent to 89.7 percent, and its share of total points from 89.7 percent to 92.8 percent. Further, Damon's cost per technical point would decrease to \$16,345, below BSI's \$16,899 price per point. Given these changes, we find that there is a reasonable chance that with more accurate evaluation results, the contracting officer would have selected Damon instead of BSI.

Consequently, we sustain Damon's protest on this ground. We recommend that the contracting officer reevaluate the decision to award to BSI in light of the conclusions reached in our decision. If the contracting officer determines that Damon is the proper awardee, the contract awarded to BSI should be terminated and award made to Damon. In addition, Damon is entitled to recover the costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.

  
for Comptroller General  
of the United States